APPENDIX.

STATUTES RELIED UPON.

Paragraphs (18), (19), (20), and (22) of Section 1 of the Interstate Commerce Act (U. S. Code, Ann., Title 49, Section 1, Paragraphs (18), (19), (20), and (22)), contained in the Transportation Act of 1920, are as follows:

Paragraph (18). After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Paragraph (19). The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Paragraph (20). The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before,

the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Paragraph (22). The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 240, Sub. (a), of the Judicial Code, (U. S. Code, Ann., Title 28, Section 347, Sub. (a)), is as follows:

> Section 347. Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

FIRST ORDER OF COMMISSION EXTENDING TIME FOR COMMENCEMENT AND COMPLETION OF PETITIONER'S RAILROAD.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 16th day of March, A. D. 1931.

Finance Docket No. 7025

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY CONSTRUCTION

Finance Docket No. 7364

WESTERN PACIFIC RAILROAD COMPANY ACQUISITION AND OPERATION

It appearing, That on January 19, 1931, the Commission by Division 4, issued its report and certificate in the above-entitled proceedings authorizing, among other things, the Western Pacific California Railroad Company to construct a line of railroad between San Francisco and Niles, Calif., upon condition that such construction should be commenced on or before April 1, 1931, and completed on or before April 1, 1933.

It further appearing, That, for good cause shown, the Western Pacific California Railroad Company will be unable to commence and complete the construction

of the line of railroad authorized in Finance Docket No. 7025 within the time prescribed in the certificate issued therein, and has filed its petition for an extension of time to July 1, 1931, and July 1, 1933, within which to commence and complete the construction of said line of railroad.

It is ordered, That the time prescribed in the certificate in Finance Docket No. 7025 within which the Western Pacific California Railroad Company shall commence and complete the construction of the line of railroad therein authorized be, and it is hereby, extended to July 1, 1931, and July 1, 1933, respectively.

By the commission, division 4.

GEORGE B. MCGINTY.

SECOND ORDER OF COMMISSION EXTENDING TIME FOR COMMENCEMENT AND COMPLETION OF PETITIONER'S RAILROAD.

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 12th day of June, A. D. 1931.

Finance Docket No. 7025
WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY
CONSTRUCTION

Finance Docket No. 7364
WESTERN PACIFIC RAILROAD COMPANY ACQUISITION AND OPERATION

It appearing, That on January 19, 1931, the Commission, by Division 4, issued its report and certificate in the above-entitled proceedings authorizing, among other things, the Western Pacific California Railroad Company to construct a line of railroad between San Francisco and Niles, Calif., upon condition that such construction should be commenced on or before April 1, 1931, and completed on or before April 1, 1933.

It further appearing, That by order entered March 16, 1931, the time for commencing and completing said construction was extended to July 1, 1931, and July 1, 1933, respectively.

It further appearing, That, for good cause shown, the Western Pacific California Railroad Company will be unable to commence and complete the construction of the line of railroad authorized in Finance Docket No. 7025 within the time prescribed in the certificate, as extended, and has filed its petition for an extension of time to January 1, 1932, and January 1, 1934, within which to commence and complete the construction of said line of railroad.

It is ordered, That the time prescribed in the certificate in Finance Docket No. 7025 within which the Western Pacific California Railroad Company shall commence and complete the construction of the line of railroad therein authorized, be, and it is hereby, further extended to January 1, 1932, and January 1, 1934, respectively.

By the commission, division 4.

GEORGE B. MCGINTY,

(Seal) *Secretary.*

ARGUMENT ON THE FACTS CONTAINED IN BRIEF FILED IN CIRCUIT COURT OF APPEALS.

II.

THE TERRITORY INVOLVED IN THIS PROCEEDING EMBRACES A PARCEL OF LAND OWNED BY ONE EMMA BOSE CONTAINING ONLY ABOUT 500 ACRES LYING IMMEDIATELY ADJACENT TO APPELLANT'S MAIN LINE RIGHT OF WAY WHICH HAS HERETOFORE BEEN SERVED BY APPELLANT, WHICH IS NOT NEW TERRITORY AND DOES NOT INCLUDE AN AREA OF 23,300 ACRES OF NEW TERRITORY NOT HERETOFORE SERVED BY APPELLANT'S RAILROAD, AS FOUND BY THE MASTER.

The Master's finding of fact No. 7 (R. 38), which was adopted as that of the Court, is as follows:

> "7. The territory involved in the present proceeding is in San Mateo County, bounded on the east by the deep-water channel of San Francisco Bay, on the north by an east and west line running through South San Francisco, and the south by an approximate line which runs through Red-

wood City, and on the west by the Bay Shore Highway. There are approximately 23,300 acres in this area, 7,200 of which lie between South San Francisco and Steinberger Creek, which are immediately available for industrial occupation. Farther to the south between Steinberger Creek and Redwood City there are approximately 3,400 acres of land which may, with some reclamation, be made available for industrial use. The territory just above described is desirable for industrial projects. (Plaintiff's Ex. 2, maps 85 and 86.) Said territory is new territory which has not heretofore been served by the defendant railroad."

Appellant's exception (R. 47) thereto is as follows:

"(2) Defendant excepts to finding No. 7 upon the ground that said finding is contrary to the evidence because the territory involved is not as specified in said finding but is only that certain piece or parcel of land owned and held in a single ownership by one Emma Rose, embracing not more than 500 acres which is not new territory and which has heretofore been served by defendant, and because the territory described in said finding No. 7, except said 500 acres, is not immediately available for industrial occupation and that the territory last described in said finding is not desirable for industrial projects."

The Master's finding is presumably predicated upon the testimony of Mr. Williams, Chief Engineer for appellee, and for the Western Pacific Railroad Company (R. 82) who testified:

Easterly of the shore of the bay there is a great area of land now submerged that can be reclaimed by the construction of a bulkhead along the channel line and the filling in of that area. The bulkhead line has not as yet been established by the United States in that vicinity, but it unquestionably will be established well out from the shore, and presumably somewhere in the vicinity of the westerly channel line. The total area east of the Bay Shore highway between South San Francisco and Redwood Creek and west of the probable location of a bulkhead line along the westerly side of the deep water channel that will ultimately be available for industrial purposes, would be approximately 23,300 acres (R. 94). Of this total area of 23,300 acres approximately 7,520 acres are ashore or reclaimed and immediately available for industrial occupation (R. 94).

He further testified that he saw no reason why appellant's proposed track could not be extended to serve the entire area now reclaimed and that may be reclaimed in the future up to South San Francisco and likewise that it could be extended along substantially the same lines as appellee's proposed railroad to serve this area down as far as Redwood Creek (R. 95).

This testimony undoubtedly shows that there are approximately 23,300 acres of land and water, largely water, lying east of the Bayshore Highway between South San Francisco and Redwood Creek and west

of the probable location of the bulkhead line along the westerly side of the deep water channel but it does not prove that the 23,300 acres are involved in this proceeding and there is no other evidence in the record to prove that that area is involved.

The evidence introduced by officers of appellant and the evidence of disinterested parties show conclusively and without contradiction that the area involved in this proceeding is limited to the land owned by Emma Rose embracing approximately 500 acres lying immediately adjacent to appellant's main line of railroad.

Mr. Burkhalter, General Manager of appellant, called as a witness by appellee (R. 100), testified: The Rose property abuts the right of way of the Southern Pacific Company for a distance of 1907 feet (R. 126). It is proposed to extend this track upon the Rose property for the sole and exclusive purpose of developing an industrial area upon the Rose property (R. 127). Our expectation is that the track will serve industries that may develop on the Emma Rose property. We do not look for any industrial development outside of the Emma Rose property for a long time to come (R. 123). The property outside of Emma Rose property will probably not be developed until after the Emma Rose property is developed (R. 108). We have no plans at this time for serving the territory that commences at the end of appellant's proposed track and extends from there

to San Mateo Point (R. 109). I know of no plans by our company to serve the property of the San Mateo Docks Company (R. 114). As far as I know our company has not been consulted with regard to supplying railroad service for the property known as Brewers Island (R. 118).

The country to the north and east of this Toll Bridge Road is marsh land and water principally on the east, and to the north of the Rose property, and is not at all as suitable for industrial development as the Emma Rose property because it requires filling in before it would be equally as useful as the Rose property. There is not any possibility of developing that property for industrial purposes in the immediate future (R. 127).

Mr. Kirkbride, Engineer of Maintenance of Way and Structures of appellant, called as a witness by appellee (R. 136) testified: If a large industry wished to locate in the immediate vicinity of this track over the Rose property, but off of the Rose property, I would present the proposition as an entirely new project to the management and abide by their decision (R. 161).

Mr. Paul Shoup, President of appellant, called as a witness by appellee (R. 197, testified): My company has a comprehensive policy for the supplying of railroad service with respect to what is known as the Rose property lying directly east of San Mateo. With the exception of that property we have no plan

at all (R. 198). The purpose which the Southern Pacific Railroad Company sought to accomplish by constructing the track under construction was to serve these 500 or 600 acres lying east of San Mateo with this industry track and to secure industries on that property. The Southern Pacific Company has no intention of extending the track in any direction. (R. 211).

Mr. Frye, a representative of the Freight Traffic Department of appellant at the time of the hearing but prior thereto Industrial Agent for appellant (R. 240), who conducted negotiations commencing in 1921 looking to the construction of this track (R. 241) and who initiated the project for serving the Rose property (R. 244), called as a witness by appellee (R. 240), testified: The only property that seemed desirable at that time (1921) was the Emma Rose property because it was higher and harder than the other property. I was authorized by my company to go ahead and tell these people (of San Mateo) that we would lay a track at the Emma Rose property so that we could develop the property industrially (R. 241). As a representative of my company I never contemplated the extension of any tracks down to deep water on the easterly side of the Emma Rose property. I was devoting my time to something that we could make use of (R. 242). What I was seeking to do in San Mateo was to develop that high land which in this case was owned, as I understood it, by the Emma Rose Estate (R. 244).

Mr. McGanney, Assistant to the Freight Traffic Manager of appellant, 18 years in appellant's service, called as a witness by appellee (R. 245), testified: I know that Mr. Frye was authorized to get up and work out a plan for the industrial development of the Emma Rose property. Such matters were a part of my particular duty (R. 247). The plan as I have always understood it and heard it discussed, was that we would serve the property of the Emma Rose estate and develop it industrially (R. 255, 256). We have no expectation of developing property adjacent to the Rose property. We have not planned nor do we expect to serve or be called upon to serve property beyond the Emma Rose property by the Emma Rose industrial switching track (R. 257).

Mr. Dawson, Assistant Division Engineer on the Coast Division of appellant (R. 260) between November 1, 1923 and July 1, 1928, who participated in the negotiations leading up to the construction of the proposed track (R. 261), called as a witness by appellant, testified: I attended a meeting in the City Hall at San Mateo in September 1925, at which there was a general discussion about the desirability of asking industries to San Mateo and particularly taking steps to locate industries on the Rose property (R. 261, 262). A committee was appointed to endeavor to work out details for making available the Rose property for industrial purposes (R. 262).

The evidence given by the officers of appellant was fully corroborated by the testimony of other witnesses.

Mr. Imboden, who was general manager of the Mercantile Building and Loan Association at the time of the hearing, and manager of the Tri-Cities Chamber of Commerce during the years 1921 to 1926 (R. 231), called as a witness for appellant, testified: I was acting quite a bit in that capacity with the development of property in the vicinity of San Mateo during the years 1921 to 1926 (R. 231). I had to do with locating or providing facilities for industries on the property known as the "Emma Rose Tract" (R. 232). We wanted to develop that whole section intensively from an industrial standpoint and tried to get the Southern Pacific to agree, at least the Chamber of Commerce did, to go further than through the Emma Rose property, but Mr. Frye who represented the Southern Pacific would not acquiesce in our request (R. 235). We could not make much progress in the development of San Mateo and that vicinity industrially because there were no facilities for switching. We always ran into a brick wall; if there are no industries there are no facilities for switching. That was the proposition. So we insisted upon the Southern Pacific Company constructing some switch tracks in that section and finally sold the idea to them and they agreed that you could hardly expect people to go there with light industries or heavy industries without having some switch track facilities (R. 233). They agreed

to construct a switch track down through the Emma Rose property (R. 234). We wanted them to come right out to deep water and always talked that but Mr. Frye never could see it (R. 235). Mr. Frye would never acquiesce in our request to develop farther out. The development he wanted was limited to the Emma Rose tract. I would have been the first to have jumped at it if we could have gotten him to agree to do it. Personally I was also trying to get trackage out to industries I was seeking to locate on deep water (R. 236). It was a part of my regular duties to locate industries out on deep water and east of the Rose properties (R. 238). Mr. Frye, as I understood it, agreed that the Southern Pacific Company would construct a switch track through the Emma Rose property at the expense of the Southern Pacific Railroad to go down 11th Street to the end of the Emma Rose line (R. 239).

The testimony of these witnesses is fully corroborated and sustained by documentary evidence which is conclusive upon this question. This evidence consists of maps filed as exhibits in this case, hereafter referred to, and the authority for expenditure and the two revisions thereof, under the authority of which the construction of the track was undertaken.

The authority for expenditure is a formal document or instrument approved and issued by the management authorizing the construction of the track in question. As pointed out in specification of error No.

12 the original authority for expenditure in this case and the two revisions thereof were made in compliance with the provisions of Valuation Order No. 3, which was issued by the Interstate Commerce Commission in pursuance of Section 19a of the Interstate Commerce Act (R. 229, 230). Order No. 3 provides that "carriers shall issue an Authority for Expenditure for each change in their property" and "each Authority issued shall describe the change authorized and its location" (R. 231). The authorities in question, in conformity with the regulations of the Commission, show that the *authorized* track is limited to the Emma Rose land. Under the authority and the two revisions appellant could do less than authorized thereby (R. 131, 164, 212) but it could not do more (R. 181). The original authority for expenditure and the two revisions thereof, with the maps attached, were introduced in evidence as plaintiff's Exhibit 5 and the original exhibit has been transmitted to this Court by order of the District Court.

The original authority is dated January 4, 1926, and approved April 29, 1926; the first revision is dated November 10, 1927, and approved February 23, 1928; and the second revision is dated August 6, 1928, and approved September 13, 1928.

These two revisions of the original authority for expenditure show the care observed by appellant in complying with the requirements of the Commission's Valuation Order No. 3. The first revision was made

necessary because of the impossibility of proceeding under the original authority by reason of the failure to get certain paper streets closed and the necessity for changing the place of junction of appellant's track with its main line (R. 179, 183). The second revision was made necessary because of a change in the length of the track to be constructed and the necessity of building a cooling tower for the Leslie Salt Company to secure a right of way over a corner of the Salt Company's property (R. 183, plaintiff's Exhibit 5, second revision of the authority for expenditure). These revisions were essential under the Commission's regulations in order to have the authority for expenditure correctly "describe the change authorized and its location" (R. 231).

The map attached to the original authority for expenditure is entitled "Southern Pacific Co. San Mateo-Leslie Proposed Industrial Development Emma Rose Property" and the authorized industrial trackage shown by a red line extends into the Emma Rose property only a short distance beyond the Bay View Boulevard (shown on map referred to). The authority itself contains a statement that "tracks now proposed will serve about 36 acres of industrial property". If there were any question as to what was meant by this it is sufficiently cleared up by the statement contained in the first revision of this authority as follows "GMO 68280 was authorized to construct 5475 feet of 90# drill track to serve some 36 acres of industrial property owned by Mrs. Emma Rose be-

tween our main track and the Bay, in the vicinity of our Leslie Station", and "It is now proposed to construct a drill track 3850 feet long, parallel to and on the bay side of the main track. From this drill track, just outside of the limits of this subdivision, it is proposed to construct 4160 feet of drill track extending toward the bay to serve the property". The map attached to this first revision is dated November 10, 1927, and is entitled "Southern Pacific Co. San Mateo-Leslie Proposed Industrial Development Emma Rose Property". The authorized industrial trackage is shown by a red line on the map attached to the authority and it extends into the Emma Rose property for about one-half the distance to the easterly limits.

The second and last revision of the authority for expenditure contains the following statement: "GMO 68280 (revised) was authorized to construct 3850 feet of drill track parallel to main and 4160 feet of track extending toward the bay to serve property owned by Mrs. Emma Rose, between our main tracks and San Francisco Bay, in vicinity of Leslie Station" and "GMO-68280 (revised) did not provide for extending the track across the entire Rose Estate. It is now proposed to construct 1960 feet of track parallel to main and 8200 feet of track extending toward bay to serve the property for its entire width". That refers to the Emma Rose property (R. 102). The map attached to this authority is dated February 10, 1928, and is entitled "Southern Pacific Company, Pa-

cific Lines Proposed Ultimate Development Emma Rose Property San Mateo Leslie".

The track to be constructed is shown by a red line which extends the entire length or width of the Rose property. The outer end of the red line is co-incident with the limits of the Emma Rose property (R. 105).

Plaintiff's Exhibit 19 (original of which has been transmitted to this Court under order of the District Court) is a Southern Pacific Company map dated October 20, 1925, entitled "Southern Pacific Co. San Mateo Leslie Possible Industrial Development Emma Rose Property".

Plaintiff's Exhibit 22 (original of which has been transmitted to this Court under order of the District Court) is another Southern Pacific map dated October 20, 1925 (Revised 10-26-25, 12-9-25, 12-11-25), entitled "Southern Pacific Co. San Mateo-Leslie Proposed Industrial Development Emma Rose Property".

Plaintiff's Exhibit 23 (original of which has been transmitted to this Court under order of District Court) is another Southern Pacific map dated October 20, 1925 (revised October 26, 1925), entitled "Southern Pacific Co. San Mateo-Leslie Possible Industrial Development Emma Rose Property".

Plaintiff's Exhibit 24 (original of which has been transmitted to this Court under order of District Court) is another Southern Pacific Company map dated October 20, 1925 (revised 10-26-25, 12-9-25,

12-11-25, Sept. 13, 1927), entitled "Southern Pacific Co. San Mateo-Leslie Proposed Industrial Development Emma Rose Property".

The original and first and second revisions of the authority for expenditure made in conformity with the requirements of the Interstate Commerce Commission and without any reference whatsoever to any proposed line of railroad which appellee subsequently proposed to construct have, as we have hereinbefore stated, furnished conclusive evidence defining the territory involved in the proceeding.

As we have heretofore shown, appellant could not construct tracks in addition to those authorized without violating the rules which have been prescribed by the Interstate Commerce Commission and the fact that these authorities for expenditure refer to future plans or ultimate future development should be entirely disregarded in determining this question. Apart from this, however, the second revision of the authority for expenditure shows that appellant had no intention at that time of constructing any track other than that on the Rose property and that upon its main line right of way.

The original authority for expenditure provides: "Tracks now proposed will serve about 36 acres of industrial property and track proposed under future plans will serve an unlimited territory extending clear to the Bay", and "Improvement and restrictions force the location to this point on property owned by

Mrs. Emma Rose who, through representative, has agreed to contribution of a 50-foot right of way over her property for a drill track and to assist in procuring similar right of way for a future extension of a proposed drill track from her easterly property line to deep water channel". Also the map attached to this authority has green lines showing "ultimate industrial development". Extending from the red line, representing authorized industrial trackage, a green line, indicating proposed future trackage, is shown running clear out to the Bay. The first revision of this authority also contains the following: "The Rose Estate will donate a 50 foot strip of right of way for ultimate extension of this track and assist in procuring other rights of way."

The map attached to the first revision also contains a green line showing "Future Track" extending clear out to the Bay.

Mr. Dawson, under whose directions these two maps were prepared, testified: The green line represents *possible* industrial development. In a way it was a dream. It was shown to meet the request of the representatives of the Chamber of Commerce to show possibilities of industrial development beyond the limits of the Rose property (R. 265, 266).

Mr. Imboden, Secretary of the Three-Cities Chamber of Commerce, testified: We wanted the Southern Pacific to come right out to deep water. We always talked that, but Frye could never see it (R. 235).

Mr. McCurdy, Manager of the Rose Estate, testified: There was some discussion as to running an industrial track in the approximate location shown as extending from the Southern Pacific Railroad easterly clear out to the right hand side of the map (that is as shown by the green line) (R. 219). We made no effort to assist the railroad in getting any right of way out easterly over any other property except the Rose property. I do recollect, in accordance with the statement in the authority for expenditure that I told the Southern Pacific Company that I would assist them in so far as we could in procuring similar rights of way for a further extension of a drill track across the Rose property but I did not take any action personally. We did not get that far (R. 220).

Whatever may have been the intention with respect to ultimate development at the time the original authority and the first revision and the maps attached to them were prepared, there was no such *intention* at the time the second revision and the map attached thereto was prepared. The map attached to the second revision is dated February 10, 1928, five months before appellee was incorporated, and the authorized track shown by the red line extends from the Southern Pacific main line out to the easterly limits of the Rose property. On this map also the "ultimate development" is shown by a green line. This "ultimate development" is limited to the building of additional trackage on the main line right of way of appellant.

In other words, the intention of the Southern Pacific Company, as finally expressed, in the second and last revision of the authority for expenditure, under which the construction was being done, is to build a track to serve the Emma Rose property industrially and that property is therefore the only area involved in this proceeding.

The Master's finding that "said territory is new territory which has not heretofore been served by the defendant railroad" refers to the 23,300 acres erroneously found by the Master to be the territory involved in this proceeding. There is no finding that the Emma Rose property alone consisting of only 500 acres of land immediately adjacent to appellant's main line right of way is new territory not heretofore served by appellant. The Emma Rose property is not new territory but is a part of the territory being served by appellant's railroad and by no other common carrier by railroad. This is fully shown under XI, *infra*.

III.

APPELLANT INTENDED TO CONSTRUCT A TRACK EXTENDING ONLY AS FAR FROM ITS MAIN LINE TRACK AS THE SOUTHWESTERLY LINE OF THE SAN FRANCISCO BAY TOLL BRIDGE RIGHT OF WAY, AS REQUIRED BY THE DEED EXECUTED BY EMMA ROSE, GRANTING APPELLANT A RIGHT OF WAY OVER 500 ACRES OF LAND IMMEDIATELY ADJACENT TO ITS MAIN LINE RIGHT OF WAY, FOR THE PURPOSE OF SERVING THIS LAND SOLELY AND EXCLUSIVELY, AND APPELLANT DID NOT PLAN TO SERVE AN UNLIMITED TERRITORY EXTENDING TO THE BAY OF SAN FRANCISCO OR ANY OTHER TERRITORY EXCEPT THIS LAND.

The Master's finding of fact No. 11 (R. 40), which was adopted as that of the Court (R. 58), is as follows:

> "11. The defendant proposed to construct a line of track extending at least as far from its main track as what is called the Toll Bridge Highway, but the plan of the defendant company, as evidenced by the authorities for expenditures, was to serve an unlimited territory extending to the Bay of San Francisco. Although defendant obtained from the owners of what is known as the Emma Rose property a right of way to the extreme easterly edge of the Emma Rose property in order to serve that property, defendant obtained a right of way from 40 to 50 feet in width, whereas, for industrial spurs, usually, the right of way is only 17 feet."

Appellant's exception (R. 47) to finding No. 11 is as follows:

"(3) Defendant excepts to finding No. 11 because the Master should have found, but failed to find from the undisputed evidence, that the defendant proposed to construct a track extending only as far from its main track as what is called the southwesterly line of the right of way of the San Francisco Bay Toll Bridge Highway and that the deed granting defendant its right of way over and across the land of Emma Rose expressly requires defendant to construct it said track only 'in a northeasterly direction to the southwesterly boundary of the San Francisco Bay Toll Bridge Company's right of way' and that the grade or grades of the railroad tracks upon said land and the elevation of said tracks 'shall be such as best serve the land as it is now for industrial purposes,' and the elevation of such track to be constructed on said land shall be subject to the approval of the grantors; and that the plan of defendant, as evidenced by its authorities for expenditure and uncontradicted evidence of its witnesses was, solely and exclusively, to serve the property of one Emma Rose consisting of approximately 500 acres lying between the main line railroad of defendant and what is called the Toll Bridge Highway, instead of finding that the defendant proposed to construct a line of track extending at least as far from its main track as what is called the Toll Bridge Highway and that the plan of defendant company, as evidenced by the authorities for expenditure, was to serve an

unlimited territory extending to the Bay of San Francisco,' and because in connection with the said finding the Master should have found, but failed to find, that it was necessary for defendant to acquire a right of way from 40 to 50 feet wide in order to provide a borrowpit to enable defendant to raise its said track as required by said deed granting it a right of way across said Emma Rose land."

As heretofore pointed out the map attached to the second revision of the authority for expenditure (plaintiff's Exhibit 5) shows the authorized track as extending beyond the San Francisco Bay Toll Bridge Road to the extreme easterly limits of the Rose property. The distance beyond the highway is perhaps about 300 or 400 feet (R. 109). It should be borne in mind, however, that the fact that the authority for expenditure authorized the construction of the track across the highway did not necessarily mean that it had to be constructed.

Mr. Paul Shoup testified: We don't always follow the authority rigidly that may be granted, because new problems come up, and they may have some new ideas, the officers, as to changes in plans—any of our officers, and sometimes I develop some of my own. We do not have to spend all the money we are authorized to spend (R. 212).

Mr. Burckhalter testified: When an authority is issued the officers handling the matter are privileged

to use their judgment, conferring with their superiors if necessary as to whether they will use all the expenditure or not (R. 131).

Mr. Kirkbride testified: The construction of the track in controversy fell within my jurisdiction, and after it had been authorized in the formal way, which has been outlined here in the testimony heretofore given, it became my duty to construct it, and to see that it was constructed expeditiously and reported completed. I could work out the engineering difficulties of location and construction, not extending the original authority or exceeding the appropriation, but to modify it within the limits thereof. That is the authority generally invested in me in constructing all similar facilities (R. 164).

The deed from Emma Rose and husband to the Southern Pacific Railroad Company, dated March 18, 1929, plaintiff's Exhibit No. 7 (original of which has been transmitted to this Court under order of District Court) provide (p. 4) "that Grantee shall construct at its sole cost and expense and have ready for operation in six (6) months from date hereof a single railroad track upon parcels Nos. 1 and 2 hereinabove described, connecting with the main track of the Grantee's near Leslie Station, San Mateo County, California, and extending from the connection of said main track in a northeasterly direction to the southwesterly boundary of the San Francisco Bay Toll Bridge Company's right of way."

Mr. Kirkbride, on cross-examination, testified as to the reason for including that provision in the deed and for not constructing the track beyond the toll bridge road: In the preparation of the detail in connection with the Emma Rose agreement and deed, the question arose as to this new toll bridge highway that had just been completed across the Emma Rose property. My recollection is that it was completed about March, 1929. It was represented to me that it was a fill possibly ten feet above the natural surface of the ground, very close to the point where the highway had been elevated to go over Seal Creek, which was a navigable stream. It was furthermore represented to me that there was a large artificial borrow-pit or canal, on the southwesterly side of the toll road, and that the waters of the bay were very close to the embankment on the other side. I argued that it was absolutely a waste of money to endeavor to build the large approach embankment to go up on this highway and then after you did get up on the highway you would have to come down into the water, and that there was no occasion for doing that, and that we should terminate the track construction where the level surface of the ground would meet the right of way of the bridge. That matter was discussed with several people. I also told Mr. Burckhalter what my conclusions were, and he nodded assent. That is the reason why that particular clause or restriction exists in the Emma Rose deed (R. 195).

Mr. Burckhalter testified: It is proposed to extend this track upon the Rose property to the southerly line of the toll bridge road for the sole and exclusive purpose of developing an industrial area upon the Rose property (R. 127). If I said yesterday that the line which we proposed to build might extend across the San Francisco Toll Bridge highway, I was mistaken, because while we have the authority to build, or rather while we have the appropriation to build across the Toll Bridge highway our agreement with the Emma Rose management is that we shall build up to the southerly line of that road and that is as far as we now intend to build (R. 129). The agreement as we all know provides that the track will be built to the southerly line of the Toll Bridge road (R. 129). The matter was discussed among ourselves and was generally understood that we would only build that much of the track required by our agreement with the Rose Estate at this time (R. 130).

Mr. Kirkbride, under whose direction the track was being constructed, testified: When the construction of the proposed spur track began I called the attention of those who had immediate charge of the construction to the provision in the deed whereby the track was to be constructed out to but not beyond the southerly boundary line of the Toll Bridge road. (R. 175). The instructions to Mr. Mathews, under whose immediate supervision the work was done (R. 136), were to the effect that we would not build across the San Francisco Bay Toll Bridge Road (R. 140).

Mr. McCurdy, Manager of the Rose Estate, testified: The road was to be built as it was called for in the conveyance (R. 217).

Mr. McGanney testified: It is not the intention to construct the track beyond the San Francisco Bay Toll Bridge Road. I read the deed from the Emma Rose estate to the Southern Pacific Company before it was executed. It only requires us to go as far as the Toll Bridge road. That was our intention (R. 255).

Mr. Paul Shoup testified: It was the intention originally to extend it (the track) to the boundary of the Rose property. That was before the San Francisco Bay Toll Bridge was projected, and it is intended now to extend it simply to the toll bridge right of way (R. 211). I said that my understanding was that we did intend originally to cross the Toll Bridge highway; that it was going to the edge of the Rose property. I had no knowledge of the Toll Bridge highway at that time. The construction which I understood my company was going ahead with was to the edge of the Rose property, but naturally we stop now in view of the obstruction that is placed there. In fact, there is very little property beyond that obstruction in the shape of the Toll Bridge highway, which is on a fill, I believe, so the engineers tell me (R. 212).

With the exception of Mr. McCurdy all of these witnesses were officers of appellant but their evidence is fully corroborated by other circumstances and evidence.

The track could not be built across the road without permission from the California Railroad Commission, a franchise from the county and various preliminaries would have to be handled (R. 129) and Mr. Kirkbride, under whose direction this track was being built, could not build across the road without bringing the matter to the personal attention of Mr. Burckhalter because Mr. Burckhalter must handle applications to the California Railroad Commission for crossing highways. They require his personal signature (R. 130).

The evidence is further corroborated by the testimony of Mr. Williams, Chief Engineer of appellee (R. 82). He testified: The survey stakes for this line start in the vicinity of the Southern Pacific's main line and they go about 3450 feet northeasterly of the end of the piece of track to the immediate vicinity of the approach to the toll bridge (R. 93). Referring to the partially completed track he testified: If the track were completed and connected up with the Southern Pacific main line and extended on out to San Francisco Bay Toll Bridge *as is indicated by the survey stakes on the ground,* it would serve from that immediate section of track all of the Emma Rose property and the property to the south belonging to the Leslie Salt Company (R. 95). In other words the survey stakes on the ground, as found by Mr. Williams, Chief Engineer for the appellee, show that the track would be constructed from appellant's main line only to the southwesterly boundary of the San

Francisco Bay Toll Bridge Road. These silent witnesses shout aloud their corroboration of the testimony of appellant's officers that it was the intention to construct this spur track across the Emma Rose property only to the southwesterly boundary of the San Francisco Bay Toll Bridge Road.

IV.

IT WAS NOT THE PURPOSE OF APPELLANT TO EXTEND THIS TRACK AT THE EASTERLY AND NORTHERLY END NORTHERLY AND SOUTHERLY AND APPROXIMATELY PARALLEL WITH THE RAILROAD OF APPELLEE BUT ONLY TO CONSTRUCT ITS TRACK FROM A POINT ON ITS MAIN LINE EASTERLY TO THE SOUTHWESTERLY LINE OF THE SAN FRANCISCO BAY TOLL BRIDGE RIGHT OF WAY.

The Master's finding of fact No. 15 (R. 42), which was adopted as that of the Court (R. 58), is as follows:

> "15. The purpose of the Southern Pacific Company was and is to connect said track at its westerly end with the railroad of the Southern Pacific Company and to extend the said railroad at the easterly end northerly and southerly, and approximately parallel with the railroad of the plaintiff."

Appellant's exception (R. 48) thereto is as follows:

> "(5) Defendant excepts to finding No. 15 that the purpose of defendant was and is 'to extend said railroad at the easterly end northerly and southerly and approximately parallel with the

railroad of the plaintiff' upon the ground that said finding is contrary to the evidence and because in this respect the Master should have found but failed to find that the purpose of defendant was and is to only construct said track from a point on its main line easterly to the southwesterly line of the San Francisco Bay Toll Bridge Road right of way."

It has been shown above under II that the only territory involved in this proceeding is the Emma Rose property containing about 500 acres lying immediately adjacent to appellant's main line railroad. It has also been shown above under III that appellant intended to construct its track from a point on its main line easterly only to the southwesterly line of the San Francisco Bay Toll Bridge road, and that the track was being built for the sole and exclusive purpose of serving the Emma Rose property industrially. This shows that the plan and intention of appellant was not to extend its track at its easterly end northerly and southerly and approximately parallel with the proposed railroad of appellee, but there is other direct evidence proving that appellant had no plan and intention of so extending its track.

Mr. Paul Shoup testified: My company has a comprehensive policy for the supplying of railroad service with respect to what is known as the Rose property lying directly east of San Mateo. With the exception of that property we have no plan at all. There has been some discussion of development immediately

south of South San Francisco and of some development lying immediately south of the cement plant at the end of the spur-track running eastward from Redwood City, but we have no plans at all for the development of the property at San Mateo point and southerly thereof and running down as far as San Francisco Bay Toll Bridge properties. I know of no discussion concerning the development of the property immediately south of that known as Brewer's Island. As to all of the territory from San Mateo point and extending northerly, there has been some discussion of the development of the property, as I said, immediately south of South San Francisco, involving the Mills estate. That is the property about where the airport is. Between the municipal airport, or the approximate location of it, and extending southerly along the Bay Shore as far as the cement plant at Redwood City in the territory bounded on the west by our main line tracks and on the east by the Harbor Line I do not recollect any project for the development of that property by our company. There have been discussions at various times of plans up and down there, but we have no plans, ourselves, for the development of any tract in there that I remember of (R. 198, 199).

The Southern Pacific Company has no intention of extending the track in any direction. The project is completely and finally outlined in the authority for expenditure which has been issued and approved and is complete in itself. It was the intention originally

to extend it to the boundary of the Rose property. That was before the San Francisco Bay Toll Bridge was projected, and it is intended now to extend it simply to the Toll Bridge right of way (R. 211).

Mr. Kirkbride testified: There was no intention on the part of the Southern Pacific to extend its tracks northerly, southerly, or easterly beyond the boundary shown in authority for expenditure. When authority for expenditure is submitted I know that it is the intention to do no more than is covered by that request and that we must not do more (R. 181).

If a large industry wished to locate in the immediate vicinity of this track over the Rose property, but off the Rose property, I would present the proposition as an entirely new project to the management and abide by their decision (R. 161).

This would necessarily follow, since appellant would, under the requirements of the Commission's Valuation Order No. 3, be required to issue an authority for expenditure for any changes in its property (R. 229, 231).

Mr. Burckhalter testified: We have no plans at this time for serving the property that commences with the end of the track on the authority for expenditure and that extends from there to San Mateo point (R. 109). I know of no plans by our company to serve the property of the San Mateo Docks Company. If there were such plans I am pretty sure

I would know of them (R. 114). We do not look for any industrial development outside of the Emma Rose property for a long time to come (R. 123).

The country to the north and east of this toll bridge road is marsh land and water principally on the east, and to the north of the Rose property, and it is not at all as suitable for industrial development as the Emma Rose property because it requires filling in before it would be equally as useful as the Rose property. There is not any possibility of developing this property for industrial purposes in the immediate future (R. 127).

In support of the allegations contained in the complaint to the effect that appellant intended to extend its track beyond the Rose property appellee introduced much evidence to show the *possibility* of extending the track to serve all or a part of the 23,000 acres, but the question involved is not whether there is a *possibility* of the track being extended but whether it was the *intention* of appellant to extend its track.

Mr. Williams, Chief Engineer for appellee, testified: The track *could* readily be extended to serve all the territory up to San Mateo point (R. 95). But as has been pointed out appellant has no plans for extending the track to San Mateo point (R. 109). He also testified: I see no reason why it *could* not be extended to serve this entire area now reclaimed and that may be reclaimed in the future up to South San Fran-

cisco (R. 95) but he also testified that to extend the line, of which this 1400 feet constituted a part, to the north it will have to cross the San Francisco Bay Toll Bridge Highway (R. 96). It has been conclusively shown, however, above under III that appellant has no intention of crossing the San Francisco Bay Toll Bridge Highway with this track. He also testified: Likewise to the south it *could* be extended along substantially the same lines as the proposed Western Pacific California Railroad Company line to serve this area down as far as Redwood Creek (R. 95).

There is no evidence in the record at all showing that it was the *intention* or *plan* of appellant to extend its track on any other property than that of Emma Rose and any farther than the southwesterly boundary of the San Francisco Bay Toll Bridge Road. On the contrary the evidence clearly shows that there was no intention or plan to extend the track in any direction.

Appellee presumably, for the purpose of showing a plan or intention on the part of appellant to extend this track, introduced in evidence as its Exhibit No. 9 (R. 200) a statement to the press by Mr. Paul Shoup dated April 1, 1929, but there is nothing in this statement that shows either plan or intention on the part of appellant to extend its track into any territory other than the Emma Rose property. So far as any intention or plan is set forth therein it shows that the

spur track under consideration was being constructed for the purpose of serving the Rose property.

After referring to the difficulty encountered in reaching an understanding with the City Manager in an effort to get certain unoccupied streets closed so that the track might be built, Mr. Shoup said: "Effort was made to avoid the difficulty by locating a new route for the purpose of serving the Rose property for which it was believed that industries could be readily secured" (R. 202). Mr. Shoup did refer to the *possibility* of extension but nowhere did he refer to any *intent* or plan on the part of appellant to extend the track. After the statement above quoted he said: "This track, by extension, also made available properties beyond" (R. 203), clearly showing *possibility* but not *intention*.

He also said: "The question then arises: Is it the best public policy to shut off from rail connection large areas that can best be used for industry, and that are not attractive from a residential viewpoint, or is it better to permit a very few industrial track crossings of the locations where such highways are to be built with proper safeguards as to switching of cars across the highways? If these few industrial spurs were built, across which the highways would be constructed later, then north and south extensions of these industrial spurs paralleling the highway would avoid the necessity of any additional crossings" (R. 205).

This last statement shows what is obvious, that if a few industrial spurs were built, across which the highways would be constructed later, then north and south extensions of these industrial spurs paralleling the highway would avoid the necessity of any additional crossings. As before stated, however, this does not express any *intention* or *plan* on the part of appellant to extend the Emma Rose spur at its easterly end either northerly or southerly or approximately parallel with the proposed railroad of appellee.

While it is manifestly *possible* to extend this or any other track indefinitely the length of the track which appellant proposed to construct must be determined by its *intention* to construct the track only to the southwesterly line of the San Francisco Bay Toll Bridge right of way. This intention is proved conclusively by the uncontradicted testimony of the witnesses and by the authorities for expenditure.

V.

APPELLANT'S TRACK WAS BEING BUILT FOR THE SOLE AND EXCLUSIVE PURPOSE OF DEVELOPING INDUSTRIALLY THE 500 ACRES OWNED BY ONE EMMA ROSE AND MEETING EXISTING DEMANDS FOR RAILROAD SERVICE THEREON.

The Master's finding of fact No. 16 (R. 42), which was adopted as that of the Court (R. 58), is as follows:

"16. Said track was not built, nor when extended as aforesaid will it be built, for the purpose of serving any now-existing industry or settlement, or meeting any now-existing demand for railroad service. The territory into which the said track will extend easterly of the plaintiff's railroad and between plaintiff's railroad and the Bay of San Francisco, and extending from the City of South San Francisco to Redwood City is unoccupied and undeveloped, there being at the present time no industry or settlement which requires railroad service at this time, nor which will, apparently, require railroad service in the immediate future."

Appellant's exception (R. 49) thereto is as follows:

"(6) Defendant excepts to finding No. 16 to the effect that said track will be 'extended as aforesaid', that is, as stated in finding No. 15, and objects to said finding to the effect that said track will be extended into any territory easterly of plaintiff's railroad and between plaintiff's railroad and the Bay of San Francisco and extending from the City of South San Francisco to Redwood City, upon the ground that said findings are contrary to the uncontradicted evidence which shows that said track will only be constructed in an easterly direction to a point on the southwesterly line of the San Francisco Toll Bridge Road right of way and that there was no intention on the part of defendant to construct its tracks beyond this point; and defendant objects to the finding that at the present time there is no industry

which will require railroad service in the immediate future for the reason that said track was built and will be built for the sole purpose of meeting the existing demands for railroad service and that there are industries which will require railroad service in the immediate future and that defendant's track was built for the sole and exclusive purpose of developing said Rose property industrially, and when completed will meet existing demand for railroad service upon the 500 acres of land owned by Emma Rose and through which its said track will be constructed."

It has been shown above under II that the only territory involved in this proceeding is that of the Emma Rose property containing about 500 acres lying immediately adjacent to appellant's main line railroad; under III, that said track will be constructed in an easterly direction only to the southwesterly line of San Francisco Bay Toll Bridge right of way for the sole and exclusive purpose of serving the Emma Rose property; and under IV that appellant has no intention or plan of extending that track in any direction. The evidence also clearly shows that there was an existing demand for railroad or switching facilities and service on the Emma Rose property.

While there were no industries located on the property of Emma Rose at the time of the beginning of the construction of the track in question there was an existing demand for spur track or switching facilities.

Commencing in 1921 the people of San Mateo were desirous of developing San Mateo by locating industries there (R. 231, 232, 241). A number of prospective industries were shown property in San Mateo, particularly the Rose property, with the idea of locating them thereon (R. 232, 237, 241, 242).

These efforts to locate industries were unsuccessful because there were no facilities for switching. Mr. Imboden testified: We always ran into a brick wall; if there are no industries there you have no facilities for switching. That was the proposition. So we insisted upon the Southern Pacific Company constructing some switch tracks in that section. So finally we sold the idea to the Southern Pacific Railroad Company and they agreed with us that you could hardly expect people to go there with light industries or with heavy industries without having some switch track facilities. They agreed to construct a switch track down through the Emma Rose property (R. 233).

Mr. Frye testified: After a year or two (after 1921) I came to the conclusion, and I believe mentioned it to the City Officials of San Mateo, that about the only way we could get industries started in San Mateo was to put a switch track down there and have something to show these prospects when I took them down. I was authorized to go ahead and tell these people that we would lay a track at the Emma Rose property so that we could develop the property industrially (R. 241).

It thus appears that spur or switching track facilities are necessary in locating industries upon industrial property and these facilities must be provided before the industries are located. There was an existing demand on the part of the Chamber of Commerce and other people of San Mateo for the industrial development of the Emma Rose property and for the construction of the spur track or switching facilities necessary to bring about that development. Repeated efforts to locate industries without available spur track or switching facilities demonstrated that the switching facilities must be provided in advance of the location of the industries.

In developing property industrially, switching tracks must be laid first and then the industries follow (R. 119, 234).

The demand for such facilities was of such importance and so pressing that in September 1925, a meeting was held in the City Hall at San Mateo to discuss the desirability of asking industries to San Mateo and particularly taking steps to locate industries on the Rose property (R. 234, 261).

In behalf of the Chamber of Commerce Mr. Imboden presented the plan of the Southern Pacific Railroad to the City Council of San Mateo to construct a switch track down through the Emma Rose property (R. 234). As a result the City Council appointed a committee to work with the Southern Pacific and the Emma Rose property, the manager of that property being E. S. McCurdy, in constructing this switch

track down through the Emma Rose property (R. 234). This committee consisted of Mayor Smith, Councilman Beer, City Manager Weissgerber, the City Attorney, Mr. McCurdy, and Mr. Peckham, the Chairman of the City Planning Commission (R. 235).

The personnel of this committee, the necessity for switching facilities in advance of development, and the activities of these representative people all show that there was a pressing demand for switching facilities as a means of developing the Emma Rose property, industrially.

VI.

APPELLANT WAS NOT CONSTRUCTING ITS TRACK FOR THE PURPOSE OF IMPEDING AND PREVENTING THE CONSTRUCTION AND OPERATION OF APPELLEE'S PROPOSED RAILROAD BUT WAS CONSTRUCTING ITS TRACK IN ACCORDANCE WITH ITS CONSISTENT POLICY OF DEVELOPING INDUSTRIAL TERRITORY ADJACENT TO ITS MAIN LINE RIGHT OF WAY.

The Master's finding of fact No. 19 (R. 43), which was adopted as that of the Court (R. 58), is as follows:

> "19. In building said track and extending the same as hereinbefore described, the purpose of the defendant company was to impede and prevent the construction and operation by plaintiff of its said proposed railroad and to prevent the construction and operation of plaintiff's railroad across said track by extending its railroad by means of said track in advance of the plaintiff's railroad into the territory heretobefore de-

scribed as lying between plaintiff's proposed railroad as located, and San Francisco Bay."

Appellant's exception (R. 50) thereto is as follows:

"(7) 'Defendant' excepts to finding No. 19 because said finding is contrary to the uncontradicted evidence and because the Master should have found, but failed to find from the undisputed evidence, that defendant's track was constructed in accordance with defendant's consistent policy of developing industrial territory adjacent to its main line right of way and that this particular project was conceived in 1921, the construction of the track was authorized April 29, 1926, prior to the time plaintiff was incorporated on July 10, 1928, and before defendant's officers had any knowledge that plaintiff intended to construct its proposed line of railroad; and that the deed granting defendant a right of way across the property owned by Emma Rose was accepted upon the express condition that:

'That Grantee will not oppose the crossing of a proposed line of railroad to be constructed by the Western Pacific Railroad Company or the Western Pacific California Railroad Company or by any corporation controlled by either of said companies, across the right of way hereby conveyed, and that if said crossing is approved by the Railroad Commission of the State of California, the Grantee will, whenever said proposed line of railroad is constructed, grant to such other company the right to construct at its sole cost and expense its railroad across the right of way hereby conveyed and

> the track constructed thereon by the Grantee, subject to the terms and conditions of the usual and customary form of crossing agreement to be executed by Grantee and such other company.' "

The Master's finding is negatived by the provision contained in the deed granting appellant a right of way across the Emma Rose property, as quoted in appellant's exception No. 7 in the next preceding paragraph. Even had appellant desired to impede or prevent the construction of appellee's proposed railroad its hands were tied by the very document granting it the right to construct its track across the Rose property. This is one of the conditions upon which the right of way was granted and it is further provided in the deed (plaintiff's Exhibit 7, p. 6) that if the grantee shall violate any of the conditions the grant should become void and the land conveyed shall revert to the grantor.

That appellant's track was not constructed upon the spur of the moment or with the object of impeding or preventing appellee from constructing its proposed railroad is further shown by the fact that negotiations leading up to the construction of this track began in 1921 (R. 214, 231, 241) and appellant agreed to construct the track in question as early as 1925 (R. 140, 233, 234, 241, 242) and the construction of the track was first authorized April 29, 1926 (plaintiff's Exhibit 5, original authority for expenditure) prior to the incorporation of appellee on July 10, 1928 (R. 2).

The reason appellant had not constructed its track previous to this time was due to the opposition of the City Manager of San Mateo. In order to build the track as shown on the map attached to the first authority for expenditure it was necessary to have certain streets closed but the City Manager refused to close the streets and to assist before the City Council in getting permission to cross certain streets. He insisted that appellant should build a subway which we estimated would cost not less than $175,000.00. This subway had no connection with the proposed track. The closing of the paper streets and the closing of certain alleys and other streets was refused. During the entire year 1926 these negotiations continued but nothing was accomplished. During 1927 the Emma Rose people, by legal means, endeavored to close these paper streets, but failed in this and toward the end of 1927 the suit was withdrawn. It appeared that it was impossible to overcome the opposition as represented by the City Manager of San Mateo (R. 144, 145).

It is true that Mr. Kirkbride, under whose supervision the track was being constructed, directed that the track be constructed with great expedition and at the same time without publicity (R. 194). The fact, however, that appellant's track was constructed expeditiously and that an effort was made to avoid publicity affords no basis for the conclusion that appellant was constructing its track for the purpose of impeding or preventing the construction of appellee's

proposed railroad. The reason for constructing the track with expedition and without publicity is readily understood in the light of all the facts leading up to the construction.

Eight years had elapsed since the beginning of negotiations, and Mr. Kirkbride wanted something done before something else arose that would interfere with the work (R. 137).

Mr. Kirkbride testified: I issued instructions that the work should be done expeditiously because we had met with delay subsequent to the meeting of the City Council on September 21, 1925, that was most extremely aggravating to me. The explanation for the opposition we encountered I never could understand or acquaint myself with. Speaking frankly, it centered about the City Manager of San Mateo. This was Mr. Weissgerber. It seemed to us that he went out of his way to oppose this industrial development. We knew that the people, generally, wanted it, we had been told that they wanted it, we were ready to build the track, the property owner was anxious to put the property on the market, and we could not understand the opposition that developed on his part to the closing of these paper streets in the southeasterly portion of San Mateo. The land was simply cow pasture. The paper streets had never been opened, or been graded. The other conditions that he put on us we felt were not valid in analyzing a problem where somebody might honestly want to build an industrial

spur. Furthermore, during these arguments that arose for nearly four years there were other happenings in San Mateo that made us think that he was against us, such as when we endeavored to fence a certain lot where encroachments were taking place, he came out with his police authority and stopped us (R. 168).

We were accused from time to time of holding up industrial development of San Mateo, that we did not build spurs to help out. This naturally aggravated us, we felt as though it was unjust (R. 170).

Those accusations were made by Mr. Weissgerber notwithstanding the efforts that were being made to construct these spurs. All of these things created a state of mind where we thought we had opposition on the part of a city official, an unjustified opposition. After we felt as though it was thought we were not honest in our intentions to build the spur, I made up my mind that I would build that spur. Having secured a right of way without incumbrance, and believing that the city manager would resort to anything he possibly could think of, even though it might not be fair means, to stop my work, I instructed that it be constructed without delay, that is, after the deed was recorded. I made myself very emphatic in connection with issuing the orders. As I have stated previously, the final order was given either Thursday night or Friday morning, following the recording of the deed (R. 170).

The fears which I entertained that Mr. Weissgerber would interfere with the construction of this track were borne out by subsequent events. He came out with the chief of police of San Mateo Monday morning and catechised the foreman severely, questioning his authority for doing the work and endeavoring to get him to stop. In addition he got out an injunction which stopped the work. We looked upon that injunction as being a phoney injunction, because of the facts being misstated, and for the further reason that in order to make certain facts correct he sent his men out after the injunction was issued by the Court and constructed a sewer line unauthorized, I think, so far as the property owners were concerned. The facts being so apparent, I then went to the mayor, and subsequently, to the City Council, and laid these various facts before them, and asked them, in effect, why there was any occasion for any dispute between the city authorities and ourselves, and why any occasion for this injunction. The result of that was that we speedily came to an agreement and the injunction of the city of San Mateo was withdrawn (R. 170).

Under this state of facts it is not surprising that appellant desired to construct the track with expedition and without publicity. Efforts had been made since 1921 to provide switching facilities for this property and appellant was being interfered with at all times by the City Manager of San Mateo, and yet appellant was accused of holding up industrial devel-

opment of San Mateo by not building spurs to help out.

Mr. Kirkbride further testified: I did not contemplate any opposition from the Bay Shore highway, because I was aware of the fact that at least in four instances in securing a right of way from South San Francisco to San Mateo they had accepted deeds in which the property owner had the right subsequently to build railroad tracks across the highway, either at grade, under grade, or over grade. Furthermore, I had knowledge of the fact that throughout the State of California we had many spur tracks crossing highways, county roads, and streets, where dense traffic exists, and in no case that I know of do the tracks cross other than at grade. Furthermore, I knew that this highway leaving San Francisco crossed over an industrial spur track at grade, known as the Carrol Avenue track, in an industrial district that has come up within the last three years. And furthermore, that this highway crossed the Southern Pacific's spur at grade in the vicinity of the county line near Bay Shore. And, furthermore, that this highway would cross a spur-track which we have at Redwood City, leading out to the cement works. And as the highway engineers and myself had worked out a great many problems whereby the railroad company granted them easements without cost for their highway construction, I did not contemplate any particular opposition from the highway engineers. I, of course, did not contem-

plate any opposition from the Western Pacific, because I presume that the provision in the Emma Rose deed protected them to their satisfaction (R. 148, 149). This deed provision is quoted above.

Appellant had another reason for constructing the track with expedition. Mr. McCurdy, Manager of the Rose property, testified: I wanted the track and I wanted it quick (R. 217).

Mr. Kirkbride testified: Under our deed we had six months to build a line but I do not think that was ample time (R. 154). It was ample as far as the physical features were concerned (R. 155). As the facts have shown, you run into all kinds of difficulties that interfere with doing your work. Mr. McCurdy had left for New York, with the idea of putting this property on the market, and it was important to have a track there so that we could show him what there was there, and to show our good faith in building the track (R. 154).

Appellant's forces, in constructing the track, worked on Sunday but this affords no basis for the conclusion that the track was constructed with the intent to impede and prevent the construction of appellee's proposed railroad.

Mr. Kirkbride testified: I gave instructions to Mr. Mathews either Thursday afternoon or Friday morning, that is, either the 21st or 22nd of March of this

year. I told Mr. Mathews probably in this language, or to this effect: I want you to get busy and build that track, we have been talking about it for about four years, and I will expect you to get results in about four days. That was said in a facetious way, but, nevertheless, I said that with the idea of impressing upon him the fact that I was disgusted with the difficulties that had been presented to us, and I wanted something done before we found something else that would interfere with the work. I gave him no instructions to continue his work over Saturday afternoon and Sunday and did not instruct him as to where he was to commence building (R. 137).

I did not tell Mr. Mathews that it was necessary for him to work over Saturday afternoon and Sunday in order to avoid the City Manager of San Mateo having recourse to the courts. We do not work Sundays. We avoid it when possible. There was a misunderstanding in connection with the working on Sunday. I had issued instructions, either late Thursday afternoon or Friday morning, that they were to get busy and build this track, and I didn't want any delay about it. Those instructions were taken literally, and the men worked Sunday (R. 151).

Mr. Kirkbride first learned about the Sunday work from the newspapers on his arrival at his office at 8:30 Monday morning, March 25th, and he dictated the following (R. 195) to Mr. Mathews:

"March 25, 1929.

"Mr. Mathews:

"I note that Saturday you ordered Coast Division to work their track forces Sunday on building the San Mateo track.

"Sunday work is not permitted and under no circumstances without authority of head of department. Furthermore, this has created the impression that we were trying to steal something. I am sorry you did not take this matter up with me. Please bear this in mind as I do not want any more Sunday work.

W. H. Kirkbride."

Mr. Williams, Chief Engineer of appellee, testified: The initial point of the track being constructed by the Southern Pacific, or its westerly end, is about 2,500 feet easterly from the Southern Pacific's main line; thence a track extends on a tangent or straight line running northeast about 1,442 feet (R. 89). The track is not connected with the main line (R. 91). The fact, however, that appellant did not begin the construction of its track at its main line does not afford any basis for the conclusion that appellant was constructing its track for the purpose of impeding and preventing the construction of appellee's proposed railroad. Bearing in mind that Mr. Mathews had instructions to construct the track expeditiously it is readily understood why he started construction at a point some distance from the main line in the light of the circumstances shown in the record.

Mr. Kirkbride testified: I said nothing specifically to Mr. Mathews about whether he was to commence building from our track or half mile away from there. I called attention to the fact that there were difficulties in the way where a drainage canal exists, into which a broken sewer debauched from our main line to and beyond Leslie Salt place. As to instructing him in regard to the exact detail where they should start, I did not so instruct him (R. 137). Beyond the levee of this canal was a level piece of ground that was probably 2,000 feet in length along our proposed spur that was perfectly level, where no grading was required. A track could be laid there expeditiously while other members of the construction gang were cribbing and working out their construction problem along the drainage canal (R. 149). This level ground was about 2,000 feet from the main tracks and beyond this level segment we ran into more terrain (R. 188).

Considering the problem involved it was not unusual to commence construction of the line 2500 feet away from the tracks with which we proposed to connect. I consider that a very good way was worked out there in connection with building this track. We had construction difficulties where the track leads off from the main Southern Pacific Company line. We found it more convenient to commence work at another place at some additional expense (R. 187).

It was quite natural for Mr. Mathews, having been instructed to proceed expeditiously with the work, to begin construction where there was least difficulty while other members of the construction gang were working out the difficulties caused by the drainage canal.

Mr. Kirkbride further testified that if we had not been stopped by the injunction there would have been a completely tied railroad connected up to the main line (R. 155).

The testimony of the Chief Engineer of appellee affords no basis for the conclusion that appellant was constructing its track for the purpose of impeding or preventing the construction of appellee's proposed railroad. Mr. Williams testified the track is laid immediately on top of the ground, except for the portion across the Bay Shore highway. The ties are not spaced as ties are spaced on a completed track. There are only a portion of a number of ties that would be necessary under this track or any other track that was in a completed state. Across the Bay Shore highway, however, the ties are spaced normally as they would be in a completed track (R. 89). This is fully explained in the record.

Mr. Kirkbride testified that his intention was to lay this track on the surface of the ground, and pick it up only sufficiently to give it a good running surface until such time as the manager of the Emma

Rose property could definitely state the grade line he wanted and which, of course, would depend on the wishes of the industries that he located (R. 150).

Mr. Kirkbride further testified: I know that more ties were laid across the right of way of the Bay Shore highway than on any other part of the road. I first learned that after the city got out an injunction and stopped our work, followed by an injunction by the Western Pacific. I went down there. I may say that this is a perfectly normal way to build a track, to put in a few ties under the joints, spike the rail to gauge, and come along and fill in the rail panels. If we had not been stopped by the injunction there would have been a completely tied railroad connected up to the main line. I do not think it was intentional that the ties were completed under the portion of the track which crossed the Bay Shore highway, for the reason that I observed that the foreman was filling in all the time from what we will call the westerly end of the rail to and beyond the so-called highway (R. 155).

Mr. Williams further testified: Very close to the Southern Pacific main line there are a few rails laid down which have a few ties. This is not really a track but it is laid at about track gauge. The track is about 100 feet long and is not attached or connected at either end. This piece of track is a short distance from the Southern Pacific main line and it is about 2,500 feet from the end of this short track

to the initial point of the 1442-foot section of track. This short section of track, cannot be joined to Southern Pacific main track for practical operation for two reasons, first, its line of direction is approximately at right angles to Southern Pacific main line and is so close thereto that there is not room between the westerly end of this detached piece of track and the main line to put in the necessary curve and switch to make a turnout from the main line (R. 92).

The construction of this short piece of track affords no basis for the conclusion that appellant was constructing its track for the purpose of impeding and preventing the construction of appellee's proposed railroad. The reason for the construction of this track is fully explained in the record.

Mr. Kirkbride testified: Some rails and a few ties were laid down immediately adjacent to our main track, out perhaps 100 feet. These were for push-car tracks, for unloading the rails and ties that were to be used immediately adjacent to the right of way, constructing eastward from the main line while other men were working westward (R. 155).

The character and methods of construction afford no basis for the conclusion that appellant was constructing its track for the purpose of impeding and preventing the construction of appellee's proposed railroad.

Mr. Kirkbride testified: The usual method of construction would be to build our tracks starting at or near Leslie and then following it out from the railroad and bringing along the material with us, but not necessarily the proper method under present methods of construction whereby we have machinery to handle material, whereas we formerly did not have machinery (R. 154).

While in some respects the methods used in building the track were unusual, I do not think the manner of handling the rails were unusual in view of the fact that we had modern tools to work with and the fact that I was building the track with expedition (R. 187). Under our present conditions we do not pay as much attention to push-car methods of building tracks as we formerly did, due to the fact that we now have modern tools to work with, such as caterpillars and autotrucks for the distribution of material. I stated an example in connection with a job south of Walnut Grove that I recently observed, where an autotruck was distributing ties four miles away from the rail-head. It is becoming more and more our practice to snake rails quite a considerable distance by means of caterpillars. To give another illustration, we have just finished the construction of quite a bit of track at the south approach to our Suisun bridge where we are building and all of that rail was snaked up there by autotruck—in that case on caterpillar tractors (R. 186).

It is significant that while Mr. Williams described the partially completed track in considerable detail he did not testify that the construction was at all unusual considering the construction difficulty presented, the necessity for expedition and modern methods of construction. Mr. Williams is an engineer of considerable experience (R. 82) and if there had been anything unusual or contrary to good construction practice he would have pointed out how and in what respect the methods of construction did not conform to good construction practice. He merely described the partially completed track in its then existing state without in any way attempting to criticize the methods of construction, leaving it to the uninformed to infer that there was something unusual about the methods of construction.

It may be justly inferred that Mr. Williams was not in a position to combat appellant's evidence that considering the problem involved a very good way was worked out there in connection with building this track (R. 187).

Mammoth Oil Company v. United States, 275 U. S. 13, 52.

The uncontradicted evidence clearly shows that appellant was constructing its track not for the purpose of impeding and preventing appellee from constructing its proposed railroad but in accordance with its consistent policy of developing industrially territory adjacent to its main line right of way.

Mr. Burckhalter, General Manager of appellant, testified: We stand ready everywhere along our line to encourage industrial development by the building of industrial switching tracks. We have done it from one end of the railroad to the other. Our common procedure is to lay down the track at the entire expense of the railroad, that is, the industrial switch track, if the owner of the property which is being developed will contribute the right of way. Thereafter, the individual industries which will locate will join in the expense of individual spur-tracks serving a particular industry. on what we call the usual industrial terms, whereby the railroad stands the cost of the switch and the terminal to the clear point, which is about 150 feet, and then the industrial pays the entire cost of the track beyond the clear point. That is our usual way of putting in industrial tracks all over the system. We have built a great many tracks in locations where there are no industries. I mean we have built a great many tracks such as these. Ever since my connection with the property I have known of numerous cases where we have built industrial tracks on the terms I have discussed, namely, at the entire expense of the railroad on the contribution of the right of way by the owner of the industrial area, in the hope that we would thereby bring track and ground together and lay the foundation for an industrial development. If we should wait until an industry actually wanted the ground it would take too long to

get the track in. So when a man decides that he wishes to make certain attractive land into industrial property, and the prospects look good for selling the property off as industrial property, we go into partnership with him, as it were, by contributing the track. We are willing to lay that down even before the first industry is in sight when, in our judgment, the area under construction is a good potential industrial property (R. 110).

As to a definite area of property and a definite owner of property where the owner intends to put his property on the market for industrial development, we have to lay out tracks first and then the industries follow. That is such a piece of property as Mrs. Emma Rose has. She or her manager have determined that they are going to sell this property for industrial purposes. It is a very fine piece of property for such purposes, and we have undertaken to contribute to that development (R. 119).

Mr. Kirkbride testified: These facilities which I propose to construct on the Emma Rose property are not exceptional or unusual. We are working on these problems and constructing similar tracks all the time, tracks intended solely and exclusively for industrial switching (R. 174).

Mr. Paul Shoup testified: This project is in accord with our general policy of constructing tracks

of this nature where there is a prospect of the property that is being served being developed for industrial purposes (R. 211).

Mr. McGanney, Assistant to the Freight Traffic Manager of appellant, testified as follows: It is our policy wherever possible, and where the prospects appear bright, to develop property adjacent to our tracks for industry purposes. In carrying out that policy we have found it necessary, in co-operation with property owners, to construct industrial switching tracks into acreage property from which individual industrial tracks may be taken to serve industries—the individual industry. We have pursued that policy to my knowledge since 1920, and before that, also, up and down our line, from Portland to El Paso, and Ogden. We found it necessary in the first instance to pursue this policy, for the reason that unless some plan could be worked out with property owners owning considerable property for the industrial development of that property, we felt that we would soon find ourselves without suitable property on which to locate industries adjacent to our rails (R. 248).

Right in San Francisco we have in recent years developed a very fine industrial district between Tunnels 3 and 4, known as the Paul Tract, to the west of the main line, and known as the Bay View tract to the east of the main line. That area of land was in vegetable gardens for many years past, and

cheap residential zones were gradually encroaching upon it. We finally interested the property owners to develop it industrially. We went ahead and built the industrial switching tracks, and there have been a number of fine industries located in that district since about 1923. Proceeding further south, we had a similar development at Bay Shore. And again, farther south, at South San Francisco. A few years ago we built an industrial switching track, or sometimes it is referred to as a drill track, the terms are synonymous, into about 100 acres of land prepared for industrial development by the South San Francisco Land & Improvement Company. No industries have as yet been located on that parcel of land, but we are confident that they will come within a reasonable time. There are several hundred other acres adjacent which will be served in a similar manner when the first hundred acres are used up. Farther south, again, at Broadway, in Burlingame, we built an industrial switching track or drill track, into twenty acres of land opposite our Broadway passenger station, on which we have succeeded in locating two industries. The San Mateo Rose Estate property was next in order, and we have, of course, discussed that development. Passing that, we put in several industrial switching tracks into a tract of about 40 acres at San Carlos, on which several industries have been located. And so on down the line—Santa Clara, San Jose, Salinas, on the Coast Line. We have followed exactly the same practice

in the East Bay District—Richmond, Oakland, Emeryville, Melrose, San Leandro (R. 249-250). We have followed the same practice exactly in Sacramento, Stockton and Fresno (R. 251).

VII.

THERE IS NO EVIDENCE IN THE RECORD THAT THE MAINTENANCE OR OPERATION OF APPELLANT'S TRACK ACROSS THE PROPOSED RAILROAD OF APPELLEE WOULD SERIOUSLY IMPEDE OR RENDER MORE DIFFICULT, HAZARDOUS OR EXPENSIVE THE CONSTRUCTION OF APPELLEE'S PROPOSED RAILROAD.

The Master's finding of fact No. 21 (R. 44), which was adopted as that of the Court (R. 58), is as follows:

> "21. The maintenance and operation of the track described across the railroad of the plaintiff will seriously impede and render more difficult and hazardous and expensive the construction of the plaintiff's railroad and its operation after completion."

Appellant's exception (R. 51) thereto is as follows:

> "(8) Defendant excepts to finding No. 21 because said finding is contrary to the undisputed evidence and also because said finding is unsupported by any evidence."

While appellee alleged in its amended complaint that the maintenance and operation of appellant's track across the proposed railroad of appellee would seriously impede and render more difficult and hazardous and expensive the construction of appellee's proposed railroad and its operation after completion, this allegation is denied by appellant. The burden of proof, that is the duty imposed by law to prove its case, was upon appellee, but appellee introduced no evidence that shows or tends to show or even remotely suggests that the maintenance and operation of appellant's track across the proposed railroad of appellee would seriously impede or render more difficult and hazardous and expensive the construction of appellee's proposed railroad and its operation after completion. By failing to introduce any evidence in support of this allegation, appellee failed to sustain the duty imposed by law and therefore there is no basis for the Master's finding.

VIII.

THERE IS NO EVIDENCE IN THE RECORD THAT THE MAINTENANCE OR OPERATION OF APPELLANT'S TRACK IN SAID TERRITORY WILL DESTROY IN A SUBSTANTIAL OR ANY MEASURE, THE VALUE OF APPELLEE'S PROPOSED RAILROAD BY DECREASING THE BUSINESS AND REVENUE OF APPELLEE'S PROPOSED RAILROAD AND IMPEDING OR RENDERING MORE DIFFICULT AND EXPENSIVE THE GIVING OF RAILROAD SERVICE BY APPELLEE.

The Master's finding of fact No. 22 (R. 44), which was adopted as that of the Court (R. 56), is as follows:

> "22. The maintenance and operation of the railroad of the Southern Pacific Company into the said new territory will destroy in a substantial measure the value of the railroad of the plaintiff by decreasing the business and revenue of said railroad and impede and render more difficult and expensive the giving of railroad service and facilities to the new territory."

Appellant's exception (R. 51) thereto is as follows:

> "(9) Defendant excepts to finding No. 22 because said finding is contrary to the undisputed evidence and also because said finding is unsupported by any evidence."

While appellee alleged in its amended complaint that the maintenance and operation of appellant's railroad into said territory will destroy in a substantial measure the value of appellee's proposed

railroad by decreasing the business and revenue of said railroad and impeding or rendering more difficult and expensive the giving of railroad service and facilities to the territory, this allegation is denied in appellant's answer to the amended complaint. The burden of proof, that is the duty imposed by law to prove its case, was upon appellee but appellee introduced no evidence that shows or tends to show or even remotely suggests that the maintenance and operation of appellant's proposed track into said territory would have such an effect. By failing to introduce any evidence in support of this allegation appellee failed to sustain the duty imposed by law and therefore there is no basis for the Master's finding.

Furthermore, appellee has no railroad, no business, and there is no assurance that it will ever have either a railroad or a business.

IX.

APPELLANT'S TRACK WILL BE CONSTRUCTED IN ACCORDANCE WITH THE USUAL PRACTICE AND STANDARDS OF CONSTRUCTING INDUSTRIAL SPUR AND SWITCHING TRACKS BY APPELLANT AND OTHER CALIFORNIA CARRIERS.

Appellant's exception No. 12 (R. 52) to the Master's report is as follows:

"(12) Defendant excepts to the master's report because the master should have found, but

failed to find from the undisputed evidence, that defendant's track will be constructed in accordance with the usual practice and standards of constructing industrial spur and switching tracks since the enactment of the Transportation Act and that at the time defendant was engaged in constructing its said track defendant had at least two hundred spur-tracks under construction at other points along its lines, and that said track will be constructed in accordance with a similar policy and practice which has been adopted by other carriers in California, including the Western Pacific Railroad Company of which plaintiff is a subsidiary, of constructing industrial switching spur-tracks at points along their lines to serve industries located thereon or to be located thereon."

The characteristics of appellant's track and its manner of construction, when considered in connection with the fact that it is being built into territory already served by appellant and by no other common carrier by railroad, as shown *infra* under XI, are helpful in determining whether appellant's track is an extension of its line of railroad or an industrial spur or switching track. The uncontradicted evidence shows that appellant's track will be constructed in accordance with the usual practice and standards of constructing industrial spur and switching tracks by appellant and other California carriers, and therefore the Master should have made a finding in accordance with appellant's exception.

It has been shown above under VI that appellant's consistent policy and practice has been and is to construct, in cooperation with property owners, industrial switching tracks into acreage property from which individual industrial tracks may be built to serve industries.

Mr. Burckhalter testified that this was appellant's policy (R. 110, 119). Mr. Paul Shoup testified likewise (R. 211). Mr. McGanney testified to the same effect (R. 248).

Mr. McGanney further testified: We have constructed such industrial switching tracks in San Francisco, South San Francisco, Burlingame, San Carlos, Santa Clara, San Jose, Salinas, Richmond, Oakland, Emeryville, Melrose, San Leandro, Sacramento, Stockton and Fresno (R. 249, 250, 251). Both the Atchison, Topeka & Santa Fe Railway and the Western Pacific have done likewise, both for their own account and jointly with the Southern Pacific Company. We have joint industrial switching tracks at Oakland, 16th Street with the Santa Fe and joint industrial switching tracks with the Western Pacific at Melrose and at Fitchburg, designed to and which are accomplishing the identical purpose for which the Emma Rose industrial switching spur was planned. All of these facilities have been constructed since 1920. None of the carriers interested in any of these facilities applied to the Interstate Commerce Commission for a certificate of public convenience and necessity under the

provisions of paragraph 18 of the Interstate Commerce Act. The Western Pacific has followed the same practice at Stockton and the Santa Fe and Southern Pacific Company at other points in the San Joaquin Valley. The Western Pacific built a long track which they considered a spur track from off of their main line just north of the city limits of Stockton, swinging around the city of Stockton to the north, to the west and thence turning east and serving the north side of the Stockton channel. The Southern Pacific constructed a similar track along the south side of the Stockton channel, although it was not as long as the one constructed by the Western Pacific but it served the same purpose. This Western Pacific track is approximately six miles long (R. 250, 251).

Defendant's Exhibit L (R. 273) reflects typical industrial switching tracks that have been constructed by Southern Pacific Company subsequent to 1920. Such construction was for the purpose of reaching industrial areas adjacent to appellant's main line of railroad.

All of these spur or industrial tracks were constructed by appellant without authority from the Interstate Commerce Commission (R. 275).

Appellant is also constructing a spur or industrial track at the City of Richmond to serve the Richmond water front without making application to the Interstate Commerce Commission therefor. From where it leaves the main line and out to where it ends this track is about 9000 feet in length (R. 276).

Mr. Kirkbride testified: The character of construction did not conform to the main line or even branch line construction. It conforms to spur track construction. There are numerous cases where facilities of a similar character have been constructed extending from the main line of the Southern Pacific along the peninsula. He pointed out where such tracks had been constructed in San Francisco, South San Francisco, Burlingame, San Carlos, Redwood City, Santa Clara, Salinas, Watsonville, Guadalupe (R. 173, 174). These facilities which I proposed to construct on the Emma Rose property are not exceptional or unusual. We are working on these problems and constructing similar tracks all the time. Tracks intended solely and exclusively for industrial switching (R. 174).

Since 1920 the Western Pacific constructed certain tracks in San Francisco west of Sixth Street and south of Bryant Street, in that general territory, similar in character to our proposed tracks and along their track in the vicinity of our railroad in the southerly part of the Oakland territory. The Western Pacific has also constructed a similar facility at Stockton since 1920 (R. 174).

The construction of the Rose spur was just one job out of many. At the time this job was going on I had actually under way over 1300 authorities, at least 200 of those authorities being the construction of spur track sidings (R. 152).

The character of construction of the track under consideration conforms to the usual method of constructing spur tracks. The rail was to be second-hand 90-pound rail released from the main line. Our policy is to wear out the rail on the main line and when it is ready to be removed we then take it up and use it for siding and spur track construction. The rail that was being used in the Emma Rose spur was of that kind, second-hand 90-pound rail. That is the same kind of rail that serves the Leslie Salt Works. A turn-out portion of the Leslie Salt Works spur is a 110-pound rail. Any spur leaving the main line, the switch turnout portion of it consists of main line rail-in this case 110. I believe the remaining portion of the Leslie spur is 90-pound rail. All of the industrial tracks that I am building this year, with very few exceptions, consist of 90-pound rail. The reason for that may be explained in this wise: In former years 75 and 80 pound rail was standard in the main line. As that rail was removed such rail was used in constructing spur-tracks. Along in 1907 the 90-pound rail was adopted as standard. That 90-pound rail now is beginning to come out of the track, and, in fact, we found it necessary, due to increased traffic in 1922, to abandon the use of 90-pound rail, and we adopted 110-pound rail for use on tangent track, and we use 130-pound rail in curved track if the tonnage justifies; if the tonnage does not justify it then the curve is laid with 110. In other words, there is no more 90-pound rail being purchased for main line use. The old rail is now com-

ing out of the track, the old 90-pound rail is now coming out of the track, due to the fact that it is in some cases as old as 20 years. Therefore, all of our construction, or, rather, a large part of our construction of spurs, yards, and sidings are 90-pound rail because we do not have the 75 or 80 (R. 166, 167). We have 90 pound rail in a number of places in our main line but we are not buying any more 90-pound rail. As that 90-pound rail wears out we remove it and use it elsewhere (R. 189). All the rail that I am laying in the main line is 110-pound rail on tangents and 130-pound rail on curves, unless the curve is very slight and then 110 pound is used (R. 188). We are removing 90-pound rail from our main line as rapidly as we can (R. 189). In building sidings, spurs and industrial tracks we use the available second-hand rail that we have (R. 193).

As to cross ties, they were 7 by 8 redwood ties, conforming to standard construction in connection with spur-tracks (R. 167). In the main line we use a larger tie, a creosoted tie, a fir mainly, 7 by 9 by 8—creosoted fir, or pine, or gum (R. 167).

It is significant that appellee introduced no evidence to contradict appellant's evidence that its track will be constructed in accordance with the usual practice and standards of constructing industrial spur and switching tracks by appellant and other California carriers and particularly to contradict appellant's testimony that the Western Pacific, the parent company

of the appellee, followed the same practice. Mr. Williams, Chief Engineer of appellee and also of the Western Pacific, who testified in this case, was undoubtedly familiar with the usual practice in this territory, certainly insofar as the Western Pacific is concerned.

Again it may be justly inferred that appellee was in no position to combat appellant's evidence with respect to the practice and standards in this territory of constructing such facilities in cooperation with property owners for the purpose of developing adjacent territory industrially.

Mammoth Oil Company v. United States, supra, p. 52.

X.

APPELLANT'S TRACK, WHEN CONSTRUCTED, WILL BE OPERATED IN THE SAME MANNER AS OTHER INDUSTRIAL TRACKS, WILL BE USED EXCLUSIVELY FOR SWITCHING CARLOAD FREIGHT FROM AND TO INDUSTRIES AND WILL HAVE NONE OF THE ATTRIBUTES OR CHARACTERISTICS OF MAIN OR BRANCH LINES.

Appellant's exception No. 13 (R. 52) to the Master's report is as follows:

"(13) Defendant excepts to the Master's report because the master should have found, but failed to find from the undisputed evidence, that the track proposed to be constructed by defendant will, when constructed, be operated in the

same manner as other industrial tracks constructed since the enactment of the Transportation Act and that said track will be used exclusively for switching purposes, no less than carload business will be handled, no passenger trains will be operated over said track, no trains or engines will be operated over said track on time-cards or schedules, the billing of freight to and from industries served by said track will be performed at the present station of San Mateo, there will be no agent located at any point on said track, there will be no telegraph lines operated in connection with said track, there will be no freight sheds nor any station buildings at all located upon or adjacent to said track, operations upon said track will be conducted in the same manner as is usual and customary in switching carload freight to and from industries at other points on defendant's lines, all switching will be performed at night, there will be no storage track for the storage of cars in connection with said track, said track will be a part of defendant's San Mateo Station trackage facilities, rates published in defendant's freight tariffs to and from said San Mateo Station will apply to industries served by said track, no less than carload rates will apply to or from industries served by said track but said less than carload rates will only apply to and from said San Mateo Station, there will not be any additional switching charge assessed for moving shipments from or to San Mateo Station and from and to industries served by said track, all shipments moving to and from industries served by said track will be billed by defendant's agent at

San Mateo as originating at said station and there will be no express or mail service performed upon said track."

The method of operating appellant's track, when considered in connection with the fact that it is being built into territory already served by appellant and by no other common carrier by railroad, as shown *infra* under XI, is helpful in determining whether appellant's track is an extension of its line of railroad or an industrial spur or switching track. The uncontradicted evidence in this case shows that appellant's track will possess none of the attributes of a main or branch line of railroad, but will be operated in identically the same manner as other industrial spur or switching tracks are operated at San Mateo and at other points on appellant's line. The Master should, therefore, have made a finding in accordance with appellant's exception.

Mr. Burckhalter testified: The service that we propose over this line is industrial switching service. By that I mean the operation of locomotives to pick up and set in cars needed by industries (R. 109). The track will be operated by a switching crew which would naturally be a local freight crew until such time as business got heavy enough to warrant the assignment of a special engine. The movements will be switching movements. The trains or cars or engines will go on and off at the junction of the industrial switching track with the track to be constructed parallel with the main track (R. 123).

The service to all industries will be switching service. By switching service I mean service performed by locomotive and a crew shifting cars in and out of tracks as distinguished from an operation over a main track where the crews operate by time-table and train orders. The less-than-carload business would be handled by the main line stations, irrespective of the number of industries which might develop (R. 124).

The proposed spur-track will be used exclusively for switching purposes. No less-than-carload business will be handled over it, no passenger trains will be run over it, and no trains or engines will be operated over it under time-card schedule. Upon completion of the track the switching should for economical reasons first be done by the local freight crew that does the switching at San Mateo now. Should the business get heavy enough, that is, the switching business get heavy enough at San Mateo and vicinity, then a specially assigned switch engine would be put on. The billing will be taken care of at the station at San Mateo. No agent will be located at any point on the track; there will be no telegraph lines extended along this track; and no freight sheds or station buildings at all located on this track. The operation of engines and trains over this track will be the same as is usually performed in the yard. The engines will move as switching engines under yard rules, which means that they will move without time-table authority or train orders, but will move under control and keep out of the way of one another when there is more than one engine, and

should there be more than one engine on the track. The operation over this track will be the same as is usually performed in switching carload freight to and from industries at other points on the Southern Pacific Company's lines (R. 128).

Mr. Kirkbride testified: This spur track is to be used for one specific purpose, namely, the switching of loaded and empty cars to and from the industries that may locate thereon adjacent to it (R. 175).

It is contemplated that the switching over this spur track will be done as follows:

The local freight, in performing its station work at San Mateo, and which is done during the midnight hours, along between one and three A. M., would set out its local freight train on the passing siding, and then the crew, in connection with spotting up on the various industrial spurs and house tracks at San Mateo, would go in on the Emma Rose spur, and if it were necessary to go down at the easterly end thereof in order to serve some industry they would proceed under control, that is, the engine would be coupled on to the cars, and a brakeman, would be riding on the top of the cars, and a brakeman would be on the engine, and they would take out the loads and spot up the empties at any industry. In crossing any road that might be existing across the spur they would proceed absolutely under control. As I stated yesterday, they would not be permitted to switch any cars across a road, or a highway, or a street, without having control

of the car through coupling with the engine. A brakeman would ride the end of the cut opposite to the locomotive, and would flag the crossing. That is the custom and that is the instruction. That is the same way in which they make switching movements right in front of the Ferry Building in San Francisco on the Belt Line, except that on the Belt Railroad in front of the Ferry Building they have long cuts of 30 to 60 cars or more. In this particular case there would never be, in my judgment, more than six cars coupled to an engine (R. 191).

Mr. McGanney testified: The proposed track will be a part of San Mateo station and the rates published in our freight tariff to and from San Mateo will apply to industries located on or served by the Emma Rose spur. There will not be an additional switching charge (R. 248).

Shipments moving to and from industries located on the Rose property will be billed by the agent at San Mateo as originating at San Mateo. They will take the San Mateo carload freight rates, and be handled in every manner similar to an industry located right alongside the freight station. If an industry should locate on either the light or heavy industrial property and have an L. C. L. shipment to deliver to, or receive from, the railroad, such shipment would be handled either by motor-truck or by dray to and from the San Mateo freight station. That is the usual and the invariable custom and the practice at all such similar points (R. 254).

XI.

THE EMMA ROSE LAND UPON AND ACROSS WHICH APPELLANT'S SAID TRACK IS TO BE CONSTRUCTED WAS AT THE TIME APPELLANT LOCATED ITS TRACK, AND IS NOW, A PART OF THE TERRITORY BEING SERVED BY APPELLANT AND WAS NOT AT ANY TIME AND IS NOT NOW BEING SERVED BY ANY OTHER COMMON CARRIER.

Appellant's exception No. 16 (R. 54) to the Master's report is as follows:

> "(16) Defendant excepts to the master's report because the master should have found, but failed to find, that the Emma Rose land upon and across which defendant's said track will be constructed was, at the time defendant located its said track and at the time defendant acquired its right of way over and across said land, and is now, a part of the territory at all of said times being served by defendant and that at all of said times said land was not and is not now being served by any other common carrier."

In order to apply correctly the rule, discussed *infra* under XIII, which the Supreme Court of the United States announced in *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266, for determining whether a track is an extension of a line of railroad or an industrial spur or switching track, it is of importance to determine whether appellant's track will provide facilities in territory already served by it and also whether this territory is served by any other carrier.

The Emma Rose tract of land consists of about 500 acres (R. 257) situated entirely within the City of San Mateo (Exhibit A attached to appellant's answer to amended complaint, R. 28). It abuts appellant's main line right of way for 1907 feet (R. 126). The property abutting appellant's main line is available for and suitable to industrial purposes (R. 127). That portion of the property immediately adjacent to appellant's main line right of way and extending to the Bay View Boulevard has been zoned as light industrial property and that portion between the Bay View Boulevard and the San Francisco Bay Toll Bridge Highway has been zoned as heavy industrial property, except the northernmost portion of the property which has been zoned for second class residential. This zoning was done under Ordinances of the City of San Mateo and the zoned areas are graphically shown on defendant's Exhibit F, sheet 3 (original of which has been transmitted to this Court under order of the District Court, R. 252, 253).

Appellant's track is located wholly within the city of San Mateo, and all on the Rose property except a very small piece that crosses the corner of the Leslie Salt Works (R. 127). It lies within the Rose property which has been zoned industrially (R. 253).

Generally the Emma Rose property at the present time is a level field commonly known as pasture land (R. 165, 169).

Appellant's railroad was built to and through the City of San Mateo in 1863 (R. 126), that is, appellant began serving the City of San Mateo in 1863 and it was still serving that territory at the time of this construction (R. 126).

Evidence introduced by appellee shows that San Mateo is served by appellant and by no other common carrier by railroad. In connection with its application to the Interstate Commerce Commission for authority to construct its proposed line between San Francisco and Redwood City, appellee in its return to a questionnaire propounded by the Interstate Commerce Commission (plaintiff's Exhibit 2, Return to Questionnaire Question and Answer 11, p. 6; the original exhibit has been transmitted to this Court under order of District Court), admits that San Mateo is served by appellant and by no other common carrier by railroad. The Emma Rose land upon and across which appellant's track is being constructed is a part of the City of San Mateo (Exhibit A attached to appellant's answer to amended complaint, R. 28), that is, a part of the territory now served by appellant and so served for many years.

The fact that the Bayshore Highway will be constructed at some time across the Emma Rose property does not limit the territory of appellant to that portion of the Emma Rose property lying westerly of the proposed location of the Bayshore Highway.

It is obvious that a highway does not operate to limit the territory served by a railroad. If it did a highway constructed immediately adjacent to the right of way of a railroad, as is often the case, would limit the territory of the railroad to its right of way. This of course would be absurd.

At the time appellant began constructing its track, and in fact at the time of the hearing, there was no highway across the Emma Rose property. There was only an intention to construct a highway but the intention did not constitute a highway. The question of appellant's track crossing the proposed highway was submitted to the Railroad Commission of the State of California to determine the necessity for the separation of grades (R. 279), and the Commission held (R. 281):

> "The Commission cannot recognize a mere intention of a state or other political body, to acquire a right of way and construct a public thoroughfare, as constructing a public road such as referred to in Section 43 of the Public Utilities Act."

Nor does appellee's proposed railroad limit the territory being served by appellant. Appellee has no railroad and cannot construct a railroad unless and until it obtains from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction of its proposed railroad. Furthermore, coun-

sel for appellee admitted that appellee had abandoned the argument with regard to the priority of location with respect to the crossing of the appellee's proposed route by appellant's track commenced on March 23, 1929. That point was abandoned when appellee discovered that its resolution of location was adopted after March 23, 1929, upon which date appellant commenced the construction of its track (R. 287).

The conditions at the time of appellant's construction necessarily determine whether the Emma Rose property was a part of appellant's territory or not. Since it conclusively appears that this property was a part of appellant's territory the situation would not be altered if appellee subsequently built its proposed railroad into appellant's territory.

XII.

APPELLANT'S TRACK, WHEN CONSTRUCTED, WILL BE AN INDUSTRIAL SPUR OR SWITCHING TRACK IN ACCORDANCE WITH THE MEANING OF THESE TERMS BEFORE THE INTERSTATE COMMERCE ACT WAS AMENDED BY THE TRANSPORTATION ACT, 1920, AND WITHIN THEIR MEANING AS THEY APPEAR IN PARAGRAPH (22) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT.

Appellant's exception No. 14 (R. 54) to the Master's Report is as follows:

"(14) Defendant excepts to the master's report because the master should have found, but

> failed to find from the evidence, that defendant's said track when constructed will be an industrial spur and switching track and that in accordance with the meaning of these words or terms as they appear in the Transportation Act of 1920 said track will be an industrial switching spur-track."

It has been shown above under VI and IX that appellant's track will be constructed in accordance with the usual policy, practice and standards of constructing industrial spur and switching tracks by appellant and other California carriers and under X that the track will be operated as an industrial spur or switching track and used exclusively for switching cars to and from industries.

Industrial spur or switching tracks are defined and described in *Associated Jobbers of Los Angeles v. The Atchison, Topeka & Santa Fe Railway Co., et al. (Los Angeles Switching Cases)*, 18 I. C. C. 310, 312, by the Interstate Commerce Commission as follows:

> "These industry spurs vary in length, some leading directly from the main track into or alongside of the industry served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to serve other industries in the immediate neighborhood."

This same language was used by the Supreme Court of the United States in defining and describing industrial spur or switching tracks in the *Los Angeles*

Switching Case, 234 U. S. 294, 306, in which case the Supreme Court upheld the decision of the Commission.

The tracks in that case varied from one-fifth of a mile to seven miles in length. In this case the length of the industrial spur or switching track, as authorized by the last revision of the authority for expenditure, is 8200 feet. The track actually being constructed was several hundred feet less than this due to the fact that it was not to be constructed further than the southwesterly boundary of the San Francisco Bay Toll Bridge road because of the obstruction made by the fill upon which that road was located.

Appellant's track is an industrial spur or switching track within the definition of the Commission and of the Supreme Court of the United States, particularly that portion which says "others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to several other industries in the immediate neighborhood." The track which appellant was engaged in constructing was the "lead" or "drill" track from which short spurs are to be built to serve the individual industries locating adjacent to the "lead."

Mr. Burckhalter testified: We would not use this track for loading and unloading cars. It is a work track. The industries to be served will be immediately adjacent to this right of way but they will take their service from a short spur track just as short as they can get along with, building out from these industrial

switch tracks that the authority for expenditure covers (R. 111). Cars will be loaded on the industrial tracks to be built by the industries located on the property. The number of spurs taking off of this track on the Emma Rose property depends altogether on the number of industries which may locate there and what their track requirements may be (R. 123).

Mr. Kirkbride testified: Off of this switching track we propose to construct spurs, relatively short, but of sufficient length to serve the industry that was proposed to locate, or that had located. They would be connected with this switching track at one end by a switch (R. 177).

Mr. McGanney testified: When there is a piece of industrial property to be developed we, in co-operation with the owner, agree to put in the necessary drill tracks from which individual spurs may be taken (R. 248).

The evidence shows that these industrial spur or switch tracks are usually constructed at the entire expense of the railroad if the owner of the property which is being developed will contribute the right of way (R. 170). The individual industry to be served by the short industrial track off of the switch, drill or lead track bears the expense of the industrial track except that appellant would bear the cost of the switch and turnout to the clearance point, that is, 13 feet from the center of the switching or lead track (R. 178). These individual industrial tracks are con-

structed under the "Industrial Track Agreement" introduced in evidence as plaintiff's Exhibit 12 (R. 177, 178, 160).

The Commission said further in the *Los Angeles Switching Cases,* on page 313:

> "There are literally hundreds of thousands of such tracks in this country. We have knowledge sufficient on which to base the conclusion that without such industry tracks the carriers of the country at large would be utterly lacking in adequate terminal facilities. For forty years and more it has been the policy of the railroad to develop traffic and facilitate its movement by the construction of such spur lines, and so extensive has become this method of direct delivery by rail that it is difficult to conceive of any system which might be devised for conducting the vast volume of our heavy traffic without the spur track, which serves the elevator, the coke oven, the coal tipple, the sawmill, the factory, the blast furnace, the stone quarry, and the jobbing house. In view of these conditions it would be manifestly unfair to treat the industrial spur as a plant facility, a shipper's convenience; it is in fact a necessity to both the carrier and the shipper under modern conditions of business and transportation."

It has been shown above that appellant's track was being constructed in accordance with the policy of railroads referred to by the Commission to build such tracks for the purpose of developing traffic and facilitating its movement. The Commission's decision was

rendered in 1910 and at the time of the construction of appellant's track that policy had been in effect nearly 60 years.

Appellant has pursued that policy both before and since 1920 (R. 249), when the Transportation Act, of which paragraphs (18)-(22) of Section 1 of the Interstate Commerce Act are a part, was passed. At the time of the construction of the track under consideration appellant was actually constructing 200 spur track sidings (R. 152).

Under the original authority for expenditure dated January 4, 1926, and approved April 29, 1926, under "description of project" is "Build Industrial Drill Track." The first revision of this authority, dated November 10, 1927, and approved February 23, 1928, contains the same description of the track. The second revised authority for expenditure dated August 6, 1928, and approved September 13, 1928, contains the same description. Under "recommendations" in each authority there is reference to the track as a "drill track" (plaintiff's Exhibit 5). Industrial switching track and drill track are synonymous (R. 249).

Mr. Paul Shoup testified: Industrial switching spur is the term we usually use where we build tracks of this nature and then serve industries through connecting industrial spurs. It is called a drill track indicating a track where cars will be moved up and down with the purpose of being switched on the industrial spur. That is the usual term in our railroad practice (R. 210).

The people interested in the development of San Mateo wanted switch tracks (R. 233).

Appellee may contend that the references in the authority for expenditures to the kind of track to be built and the characterization of the track as a switching track or drill track do not necessarily prove that the track in question is an industrial spur or switching track. When, however, these matters are considered in the light of the policy of railroads, as referred to by the Commission, and the policy of appellant and other carriers in this territory to construct such tracks for the purpose of developing adjacent territory industrially, and for the purpose of developing traffic, the description of the track as contained in the authorities for expenditure and the kind of track wanted by those interested in the development of San Mateo industrially, are persuasive in determining the character of the track, particularly when the description was used long before appellee considered building its proposed railroad from San Francisco to Redwood City and long before appellee was incorporated.

The deed (plaintiff's Exhibit 7, the original of which has been transmitted to this Court under order of District Court) from Emma Rose and husband, contains the following provision as a condition (p. 4):

> "That the grade or grades of the railroad track or tracks on the parcel of land above described, and the elevation of said track or tracks shall be such as to best serve the land as it now is for industrial purposes, and the elevation of [illegible]

track or tracks to be constructed on said parcel of land hereinabove described shall be subject to the approval of the grantors; and in the event the grantors fill their land adjoining said parcel of land above described, the grantee will, upon receipt of written notice from the grantors, raise said track or tracks and fill the parcel of land above described to the same level of the adjoining land of the grantors."

This provision shows that appellant's track is to be constructed in such a way and upon such grade as will best serve the Emma Rose property industrially and not in such manner as to serve any other territory. If appellant were constructing a main line or a main branch line rather than an industrial spur or switching track it is inconceivable that it would agree that the grade of such track would be subject to the approval of the grantor of the right of way or that appellant, after once having established the grade, would change such grade upon request of the grantor to make such grade conform to the individual requirements of the property of one individual. This provision shows conclusively that the track was being built as an industrial spur or switching track for the development of the Emma Rose property industrially and not as an extension of appellant's line of railroad and is an industrial spur or switching track within the meaning of those words as used in paragraph (22) of Section 1 of the Interstate Commerce Act. This question is discussed fully *infra* under XIII.

